

FILED
UNITED STATES DISTRICT COURT OFFICE
DISTRICT OF MASSACHUSETTS - CENTRAL DIVISION

JOSEPH M. LOSAPIO,)
PLAINTIFF)
VS.)
METROPOLITAN LIFE)
INSURANCE COMPANY,)
DEFENDANT)

2004.08.27 A 10:53

CIVIL ACTION NO.

04-40156-FDS

**PLAINTIFF JOSEPH M. LOSAPIO'S MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION TO CONSOLIDATE
PURSUANT TO F.R.C.P. 42 AND L.R. 40,1(i)**

Plaintiff Joseph M. Losapio hereby opposes the Defendant's Motion to Consolidate this action with the case of Joseph M. Losapio v. The Lincoln National Life Insurance Company, Docket No. 0469CV0193 which is pending in the East Brookfield District Court, County of Worcester, Massachusetts.

FACTS

On October 22, 1985, the Lincoln National Life Insurance Company (hereinafter referred to as "Lincoln Life") issued a policy for disability benefits to plaintiff Joseph M. Losapio (hereinafter referred to as "plaintiff" or "Mr. Losapio"), whereby Lincoln Life agreed to pay initial monthly benefits up to \$2,000.00 to the plaintiff in the event he became disabled. (Plaintiff's Complaint, Paragraph 3). On March 23, 1995, the plaintiff was injured in a motor vehicle accident, which resulted in injuries which caused a partial disability. (Plaintiff's Complaint, Paragraph 5). Thereafter, Mr. Losapio, who is an attorney, made a claim with Lincoln Life for residual disability benefits, which were paid by Lincoln

Life from 1995 through July of 2003. (Plaintiff's Complaint, Paragraphs 6, 8 and 12). In August of 2003, Metropolitan Life Insurance Company (hereinafter referred to as "MetLife"), who had assumed administration of the Policy in 1999, alleged that Mr. Losapio no longer met the definition for residual disability benefits under the terms and provisions of the Policy and discontinued payments of residual disability benefits. (Plaintiff's Complaint, Paragraphs 10, 12 and 13).

On or about June 24, 2004, Mr. Losapio filed a Complaint against Lincoln Life in the District Court Department, East Brookfield Division, Worcester County, Massachusetts, Civil Action No. 0469CV0193 (hereinafter referred to as the "Lincoln Life Complaint"). The Lincoln Life Complaint was a simple breach of contract action to recover residual disability payments owed to Mr. Losapio by Lincoln Life for the period from August 1, 2003 to January 31, 2004. Exhibit "B" of Defendant's Memorandum.

On or about July 14, 2004, Mr. Losapio filed this Complaint (hereinafter referred to as the "MetLife Complaint") in the District Court Department, East Brookfield Division, Worcester County, Massachusetts, Civil Action No. 0469CV0226. In the MetLife Complaint, Mr. Losapio claimed that MetLife had committed numerous unfair and deceptive acts in its administration of the Policy. (Plaintiff's Complaint, Paragraph 11). Although the most egregious act committed by MetLife was the denial of payment to Mr. Losapio even though all the medical evidence demonstrated that he had met the

Policy requirement for "Residual Disability", the 93A Demand Letter attached to Plaintiff's Complaint details a pattern of unfair and deceptive acts committed by MetLife from the time it assumed administration of the Policy through March of 2004. (Plaintiff's Complaint, Paragraphs 11, 12 and 13).

ARGUMENT

Consolidation under F.R.C.P. 42 should be used to expedite trial and eliminate unnecessary repetition and confusion. In re Lease Oil Antitrust Litigation, 186 F.R.D. 402, 403 (S.D.Tex. 1999). These objectives, however, cannot be pursued at the sacrifice of fairness to all parties. Webb v. Goord, 197 F.R.D. 98, 101 (S.D.N.Y. 2000). Although the District Court has the power to order consolidation for pre-trial purposes, "this power is not unharnessed and such extraordinary relief should be granted only under compelling circumstances and when attempts to seek more conventional avenues of relief have been exhausted." State Mut. Life A. Co. v. Peat, Marwick, Mitchell & Co., 49 F.R.D. 202 (1969). Examples of such conventional avenues of relief are protective orders under Federal Rules F.R.C.P. 30(b) or (d), or a coordinated discovery program providing for the common use of depositions. Id. at 207. The party seeking consolidation has the burden of proving that consolidation is warranted. Webb v. Goord, 197 F.R.D. 98, 101 (S.D.N.Y. 2000).

Applying these principles to this case leads to the conclusion that consolidation is not warranted and that

Defendant's Motion should be denied. In Federal Court, there is no option for the 93A issues to be decided by a jury. Michael C. Gilleran, The Law of Chapter 93A, §12:19 428, 429. The Court has the responsibility to assess and decide the facts and legal issues relating to the 93A claim. Berger v. Vanasse, No. 86-1968-N, slip op. (D.Mass.Mar. 22, 1989) (Collings, USM), p.2, 17 M.L.W. 1594 (Apr. 24, 1989). The Court does have the option of submitting the 93A issues to the jury on a non-binding advisory basis, together with the breach of contract claim against Lincoln Life. Michael C. Gilleran, The Law of Chapter 93A, §12:19 428, 429. This option, however, would be contrary to the purpose of consolidation under Fed.R.Civ.P. 42 of expediting trial and eliminating unnecessary repetition and confusion. In re Lease Oil Antitrust Litigation, 186 F.R.D. 402, 403 (S.D.Tex. 1999).

Mr. Losapio's Complaint against Lincoln Life is a simple breach of contract action. Mr. Losapio alleges that Lincoln Life breached its agreement under the Policy when it terminated payment of benefits beginning in August of 2003. The only issues in that Complaint are whether Mr. Losapio met the definition for residual disability benefits under the Policy, and if so, what were the monthly benefits due him under the Policy. The primary evidence in that claim will be the testimony of Mr. Losapio, the Policy language and the medical reports.

In the claim against MetLife, Mr. Losapio has alleged a pattern of unfair and deceptive acts committed by MetLife for

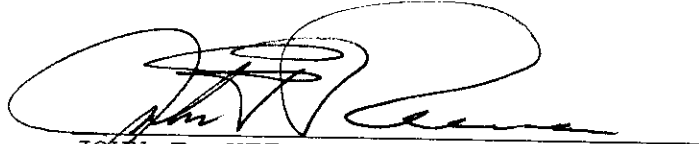
the period from December of 1999 through March of 2004. To determine whether Mr. Losapio is entitled to relief under that claim, it will be necessary to review the conduct of MetLife for that entire period. In addition, MetLife's investigation of Mr. Losapio's claim and its interpretation of the Policy language during that entire time period must be compared to the investigation and interpretation of the Lincoln Life's claims department for period from 1995 through 1999.

Furthermore, Mr. Losapio's conduct and cooperation with Lincoln Life's and MetLife's claims department for the period from 1995 through 2004 will probably be an issue in the 93A claim. Since Met Life is acting now as the claims administrator for Lincoln Life, it may be difficult to locate the claims representative of Lincoln Life who handled the plaintiff's claim. Accordingly, the discovery in the 93A claim will probably be much more extensive and protracted than in the breach of contract claim, as will be the evidence at trial. Therefore, since the consolidation of these claims will only serve to delay the trial of the breach of contract claim and will create issues that could confuse the jury, the Defendant's Motion should be denied.

Lastly, it would be unfair to Mr. Losapio if these actions were consolidated. The plaintiff has not received residual disability benefits from Lincoln Life since August of 2003. The type of Policy purchased from Lincoln Life was bought and sold with the purpose of providing Mr. Losapio and his family with financial security and peace of mind. (e.g.,

see printout, attached as Exhibit "A", from MetLife's website, dated September 26, 2003, entitled Individual Disability Income Insurance - Plan for continued income. Then relax.)). Accordingly, any delay in the trial of the breach of contract claim against Lincoln Life would be unfair to Mr. Losapio and would result in prejudice to him.

WHEREFORE, Mr. Losapio respectfully requests that the Defendant's Motion to Consolidate be denied.



JOHN F. KEENAN, ESQUIRE
390 Main Street
Worcester, MA 01608
Attorney for Plaintiff
508-791-8181
BBO# 264000
Dated: 8/27/04

CERTIFICATE OF SERVICE

I John F. Keenan, hereby certify that on this day, I served a copy of PLAINTIFF JOSEPH M. LOSAPIO'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO CONSOLIDATE PURSUANT TO F.R.C.P. 42 AND L.R. 40,1(i), by mailing a copy thereof, first class, postage prepaid, to Attorney James J. Ciapciak, Ciapciak & Associates, 99 Access Road, Norwood, MA 02062.

DATED: 8/27/04



JOHN F. KEENAN, ESQUIRE

EXHIBIT "A"

Individual Disability Income Insurance

Plan for continued income. Then relax.

What would happen if your paychecks suddenly stopped because you were too sick or injured to work? What if you couldn't work for months – or years?

You'd still have to pay all your monthly bills, including food, utilities, house and car payments. Add in things like tuition and retirement funding, and it's easy to see how savings could quickly disappear.

You can't rely on other income sources like Social Security to protect you. In most cases, they don't apply – or aren't enough. But you can plan ahead to help protect your lifestyle. To learn more, click here: [Other Income: A Reality Check](#)

MetLife has flexible Disability Income Insurance options that:

- Provides monthly income to help maintain your standard of living
- Can be customized to fit your particular situation
- Helps you retain independence and dignity without burdening others
- Helps keep your financial dreams and goals for the future intact.

:: RelatedLinks

- [Annuities](#)
- [Auto Insurance](#)
- [Building Financial Freedom](#)
- [Choosing a Bank](#)
- [Financial Planning for College](#)
- [Life Insurance](#)
- [Life Insurance Glossary](#)

:: QuickLinks

- [MetLife Bank](#)
- [MetLife eSERVICE](#)
- [Planning Services](#)

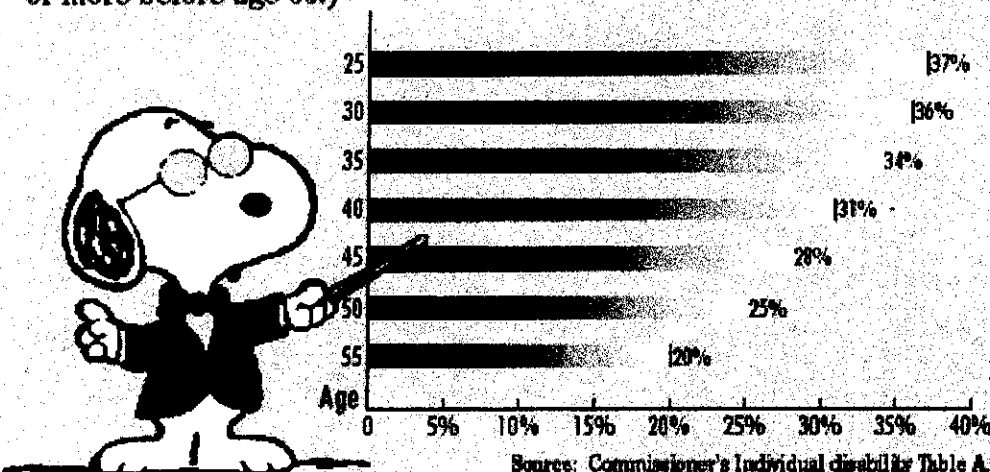
:: Find a MetLife Representative

To find a MetLife representative by specialty or location, [click here](#).

Your Risk of Becoming Disabled

What Are The Chances?

(Of an employed individual becoming disabled for 90 days or more before age 65.)



PEANUTS © United Feature Syndicate, Inc. www.snoopy.com

Other Income: A Reality Check

- * Commissioner's Individual Disability Table A
- ** National Underwriter Magazine, May 2001